Supreme Court judgment on jurisdiction clauses for marine cargo claims

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In a judgment, the Danish Supreme Court have ruled on the applicability of Section 310 of the Danish Merchant Shipping Act to jurisdiction clauses in favour of the English courts. While the judgment confirms that such jurisdiction clauses were enforceable under the Danish legal regime for marine cargo claims before Brexit, the judgment also indirectly serves as a reminder of the position post-Brexit, where such jurisdiction clauses will be set aside more often by the Danish courts.

The Supreme Court judgment also provides useful guidance on the applicability of the Brussels (Recast) Regulation to disputes involving two parties based in the same EU Member State. The findings apply not only to maritime and transport related disputes but have a significant impact for all types of legal disputes.

The contract of carriage

The dispute arose out of a contract of carriage for the transport of containerized high-pressure cleaners manufactured in China. The seller of the goods booked the ocean carriage of the containers from Shanghai to Copenhagen with a Danish freight forwarder, who subcontracted the carriage to a Danish container carrier. The

Danish container carrier issued bills of lading for the carriage identifying a Chinese subsidiary of the Danish freight forwarder as shipper.

The ocean carriage from Shanghai to Copenhagen involved calls at various other ports. During the transport from Tanjung Pelepas in Malaysia to Algeciras in Spain, the ship carrying the containers encountered a severe storm. As a result, the containers were washed overboard and lost in the Mediterranean Ocean.

The Danish buyer of the cargo filed legal proceedings against the Danish freight forwarder at the Copenhagen City Court claiming damages for the lost cargo. The Danish freight forwarder in turn filed legal proceedings against the Danish container carrier, joining the carrier to the proceedings already commenced by the cargo owner.

The container carrier argued that the freight forwarder's case should be dismissed. The container carrier's bill of lading terms referred to and incorporated a jurisdiction clause in favour of the English courts, and the Danish courts therefore had no jurisdiction to consider the freight forwarder's claim.

The freight forwarder in turn argued that it was entitled to sue the container carrier in Denmark under Section 310 of the Danish Merchant Shipping ACT ("DMSA"). The Copenhagen City Court ordered that the issue of jurisdiction should be considered and determined in separate, preliminary proceedings.

In those proceedings, the City Court found in favour of the freight forwarder. Upon the container carrier's appeal of this ruling, the Danish Eastern District Court upheld the City Court's findings. However, upon the container carrier's second and final appeal, the Supreme Court found in favour of the container carrier, thereby dismissing the freight forwarder's case. The case can be read here. Please contact us if you are interested in an English translation.

The legal points in dispute

The key point in dispute was whether the container carrier's jurisdiction clause should be upheld, or whether the freight forwarder was able to invoke the grounds for jurisdiction under Section 310 of the DMSA as the basis for filing legal proceedings in Denmark.

Chapter 13 of the DMSA regulates the carriage of goods by sea, including the liability of the carrier for loss of and damage to goods etc. arising while the goods are in the custody of the carrier. Chapter 13 also sets out specific provisions on jurisdiction for claims relating to carriage of goods. Section 310(1) states as follows:

Section 310

Subsection 1. Any prior agreement which restricts the plaintiff's right to have disputes regarding carriage of goods pursuant to this part decided by civil legal proceedings shall be void to the extent that it restricts the plaintiff's right, at his option, to institute an action with a court at one of the following places:

1) the principal place of business, or in the absence thereof, the habitual residence of the defendant, or

2) the place where the contract was made, provided that the defendant there has a place of business, branch or agency through which the contract was made, or

3) the port of loading agreed in the contract of carriage, or

4) the agreed or actual port of discharge pursuant to the contract of carriage.

This limitation of the validity of jurisdiction clauses does not, however, apply to the extent that the application of the provisions of section 310, subsection 1, would be contrary to the Brussels (Recast) Regulation or the Lugano Convention, nor does it apply for carriage of cargo where neither the place of receipt, or the agreed or actual place of delivery, is in Denmark, Finland, Norway or Sweden. This follows from DMSA section 310, subsection 5.

Where the place of receipt and/or the agreed and/or actual place of delivery is in Denmark, Finland, Norway or Sweden, the right to commence legal proceedings in the Danish courts for a cargo claim under section 310, subsection 1, of the DMSA thus overrides an agreed jurisdiction clause in the contract of carriage - unless the jurisdiction clause is governed by the Brussels (Recast) Regulation or the Lugano Convention.

A key issue in the Supreme Court case was therefore whether the Brussels (Recast) Regulation applied to the contract of carriage and the jurisdiction clause. While the Brussels (Recast) Regulation applies to disputes between parties based in different EU Member States, in order for the Regulation to apply between two parties based in the same EU Member State, case law of the European Court of Justice indicates that the parties' relationship must include an international element. The mere fact that the contract includes a jurisdiction clause in favour of another EU Member State is not sufficient for this purpose.

The container carrier argued that such an international element was indeed present in this case, including since the contract of carriage was entered into with a Chinese company, and since the carriage itself (including the obligations to be performed by the container carrier) involved several jurisdictions outside of Denmark.

While the City Court and the Eastern District Court ruled against the container carrier, the Supreme Court found in favour of the container carrier, citing the arguments put forward by the carrier in this regard.

The implications of the Supreme Court judgment

The judgment clarifies the position with respect to the application of the Brussels (Recast) Regulation between two Danish parties – regardless of whether the dispute between them arises out of a contract for the carriage of goods by sea. The facts of the case also provide useful illustrations of the types of factual circumstances that may be considered to be international elements in the sense that the Brussels (Recast) Regulation should be applied.

The judgment further confirms that jurisdiction clauses are enforceable under the legal regime applicable for marine cargo claims under the DMSA. However, as the case was commenced before Brexit, it should be noted that the position with respect to jurisdiction clauses in favour of the English courts has changed significantly with Brexit.

We have previously written a brief about the effect of Brexit on jurisdiction clauses subject to the DMSA

This is important, since many Danish ship owners and other carriers traditionally issue bills of ladings for carriage of goods with jurisdiction clauses favouring the English courts. Based on section 310, subsection 5, of the DMSA, such exclusive jurisdiction clauses would previously have prevailed over the right for the cargo owner to commence proceedings against the carrier in the Danish courts under section 310, subsection 1. However, after Brexit the jurisdiction clauses will not prevail where the place of receipt and/or the agreed and/or actual place of delivery of cargo is in Denmark, Finland, Norway or Sweden. Instead, ship owners and other carriers must accept that cargo claims may be brought against them in the Danish courts – regardless of jurisdiction clauses in their bills of lading favouring the English courts.

After Brexit, the fall-back position currently applicable to the United Kingdom after the expiry of the transition period is to be found in the Hague Convention on Choice of Court Agreements of 30 June 2005 (the "Hague Convention"). The Convention provides that exclusive jurisdiction clauses must be respected by the courts of the member states. However, the Convention does not apply to the carriage of passengers and goods, see article 2(f). Further, the Convention does not trigger the exception in section 310, subsection 5, of the DMSA to the jurisdiction rules and the grounds for establishing jurisdiction in section 310, subsection 1.

This means that section 310, subsection 1, will prevail over jurisdiction clauses in favour of the English courts with respect to cargo claims, provided the place of receipt and/or the agreed and/or actual place of delivery of the cargo is in Denmark, Finland, Norway or Sweden. This grants jurisdiction to the Danish courts with respect to cargo claims involving Danish carriers.

It also grants jurisdiction to the Danish courts for cargo claims involving non-Danish carriers, provided the contract of carriage was entered into in Denmark, and/or the agreed port of loading was in Denmark, and/or the agreed or actual port of discharge was in Denmark, see Section 310 of the DMSA.

Should the UK join the Lugano Convention, the position set out above will revert to the familiar regime whereby jurisdiction clauses in favour of the English courts will prevail for cargo claims subject to chapter 13 of the DMSA. The UK applied to join the Lugano Convention in April 2020. However, the application was rejected by the EU Member States on 1 July 2021. Accordingly, there is currently no indication that the legal regime described above will change in the near future.

Sectors	Shipping, transport and logistic